IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 718 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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RAMESH MAGANLAL NAIK

Versus

UNITED COMMERCIAL BANK

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Appearance:

MR RM VIN for Petitioner

MR AC GANDHI for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 24/04/96

ORAL JUDGEMENT

The defendant in the suit is the appellant and the plaintiff in the suit is the respondent herein. They are referred to as 'the plaintiff' and 'the defendant' in this appeal which is filed by the defendant against the plaintiff by bringing under challenge the judgment and decree dated 28/11/1978 passed by the learned Civil Judge (Senior Division), Bharuch in Special Civil Suit No. 16

of 1973.

2. The plaintiff-bank filed the aforesaid suit for recovery of Rs.11,220-10 with interest at 10.5% p.a. and cost of the suit from the defendant, asserting that defendant availed of loan advance to the extent of Rs.20,000/- and cash credit advance to the extent of Rs.5,000/- as per the terms and conditions detailed in the hypothecation deed dated 10/1/1972 executed by the defendant in favour of the plaintiff-bank, a nationalised bank. The defendant became heavily indebted and could not honour his obligations under the advances in question, as also to his other creditors. After having exhausted the limit of Rs.25,000/- as aforesaid, he had issued cheques under the aforesaid advances resulting in the dishonour of the cheques. The defendant failed to pay the rent of his hired premises in Ghee Kundiya, Bharuch, and interest on the aforesaid advances as and when accrued due. The defendant committed breach of the terms and conditions of the hypothecation agreement and on the night of 16/11/1972 absconded from Bharuch without leaving any trace or address. Under these circumstances, it became necessary for the bank to safeguard its rights and interest under the deed of hypothecation. The plaintiff-bank accordingly took possession of the hypothecated goods under a Panchnama and as the premises were found unsafe, unsecured and risky to retain hypothecated goods therein, two watchmen costing about Rs.700/- p.m. would be required to be appointed. Besides, the goods were likely to be damaged, deteriorated and depreciated in value by lapse of time and the rent of the premises and interest would go on mounting. Under such circumstances, the plaintiff-bank in the interest of both the parties, sold the hypothecated goods to one respectable purchaser for Rs.17,001/- as no one else was prpared to pay a higher price. From the amount of Rs. 17,001/- the amount of Rs.5,885/- was credited to the cash credit account of the defendant, which was accordingly squared up. The remaining amount of Rs. 11,115/- was credited to the loan account of the defendant leaving the outstanding of Rs. 11,200-10 for which the plaintiff was required to file the suit in question as stated above.

3. The defendant resisted the suit as per his written statement exh. 25. According to his contention the hypothecated goods were worth Rs.52,000/- as shown in the schedule attached to the written statement. He denied the allegations made in the plaint. According to him the plaintiff had taken away not only hypothecated goods but also the goods of one Automobile Institute of

Technology although such goods were not hypothecated. The value of all these goods was alleged to be Rs.52,000/-. According to him the price of the goods were rising and not decreasing. Had proper procedure of public auction been followed by the plaintiff-bank, the goods would have fetched the price between Rs.25,000/- to Rs.40,000/-. Bearing in mind this aspect of the case, it has been contended by the defendant, that the plaintiff would not have any claim to be made from the defendant. On the contrary a sum of Rs.10,000/- would have remained due and payable by the plaintiff-bank to the defendant. The defendant accordingly prayed for such a decree being passed in his favour as per the counter claim made by him.

4. The plaintiff-bank gave reply exh. 36 to the defendant's counter claim. While denying the allegations made in the counter claim, the plaintiff-bank asserted that counter claim could not be entertained by the Court, that the counter claim was not properly valued for the purpose of court fees, jurisdiction and the advocate fees, that the statements of facts with regard to the value of goods and other statements of facts made in the counter claim were not true and that the defendant would not be entitled to any amount from the plaintiff-bank.

5. Following issues were framed by the learned trial Judge :-

(1) Whether the plaintiff-Bank had under the hypothecation deed, no right to seize the goods and to sell directly to individuals ?

(2) Whether defendant proves that the goods seized and sold by the Bank valued Rs.52,000-00 and they would have fetched price of Rs.35,000-00 to Rs.45,000-00 if sold by public auction ?

(3) If yes, what is the effect of the sale having not made by public auction ?

(4) Whether defendant is entitled to recover Rs.10,000-00 from the plaintiff-bank deducting the suit amount ?

(5) Whether the counter claim is not maintainable in the present suit ?

(6) Whether this Court has no jurisdiction to entertain the counter claim ?

(7) Whether the counter claim is not properly valued

for the purpose of Court fees ? If yes, what is the proper valuation ?

(8) To what reliefs, if any,the parties are entitled?

(9) What order and decree ?

6. The learned trial Judge gave following answers to the issues :-

(1) No.

(2) No.

(3) The sale is not vitiated even though the seized goods were not sold by public auction.

(4) No.

(5) Not pressed.

(6) Not pressed.

(7) No (ii) Does not survive.

(8) The suit of the plaintiff has to be decreed and the counter claim of the defendant has to be dismissed.

(9) As per order below.

7. In the result the learned trial Judge passed decree as under :-

"The plaintiff do recover a sum of Rs.11,220-10 with running interest at the rate of 10.5 p.c. per annum from the date of the suit till the amount is realised from the defendant. The defendant to bear his own costs and that he should bear the costs of the suit of the plaintiff. The counter claim of the defendant is dismissed. So far as the costs of counter claim is concerned, each party to bear his own costs of counter claim. The order of attachment before judgment passed on 27/3/73 is hereby made absolute."

As stated above, the defendant has challenged the aforesaid judgment and decree in this First Appeal u/s.

96 of the Code of Civil Procedure.

8. I have heard the learned counsel for the defendant-appellant. The short submission of the learned counsel for the defendant is that even that the learned trial Judge has made observations against plaintiff-bank with regard to the action of the plaintiff-bank of taking possession of the hypothecated goods and selling them by private sale, the learned trial Judge has accepted the plaintiff's case and has passed the decree as aforesaid. This is quite contradictory in terms and no decree could have been passed, submits Mr. Vin learned counsel for the appellant. Following observations of the learned trial Judge have been read before me for canvassing the aforesaid argument :-

"The plaintiff's Branch Manager Dilipkumar did not sell the seized goods by public auction but he sold them by private sale. The learned advocate for the defendant has seriously attached on such an attitude of the bank authorities. I also feel that the way in which the bank authorities have acted in this case cannot be justified. They have acted high handedly against the defendant. It is on record that the plaintiff's Branch Manager seized the goods of the defendant on the night on 17/11/1972 after taking keys of the factory of the defendant from his servant. The plaintiff's Branch manager even did not serve any notice to the defendant before seizing the goods of the defendant. The matter does not rest there. After seizure of the goods, the plaintiff's Branch Manager sells the seized goods to one Mr. Aslot on that very night i.e. on night of 17/11/72. He sold the goods by private sale. The plaintiff's Branch Manager did not give any notice to the defendant before selling his goods. The matter does not rest there. He sold the seized goods by private sale and that too at night time. He does not give any public auction for selling the goods by public auction. He could have issued public notice for selling the seized goods by public auction and could have sold the suit goods by public auction after few days after seizure of the goods so that highest price of goods could have been realised. He, however, did not do so for the reasons best known to him. The matter does not rest there. It is on record that the defendant was running his factory in the godown of Chandulal Nanalal. The defendant was tenant of Chandulal Nanalal.

The plaintiff's Branch Manager Dilipkumar goes to length further and he hands over the possession of above rented premises to Chandulal Nanalal directly without infomring the defendant. The above evidence on record shows that the way in which the plaintiff's Branch Manager has acted is not justifiable. The above act of the Bank authorities has to be condemed and it cannot be approved by the Court of law."

The learned trial Judge has dealt with the submissions made on behalf of the plaintiff-bank in this regard and has and has observed in paras. 23 and 24 as under :-

"(23) The learned advocate for the plaintiff has, hwoever, tried to justify the above act of the bank authorities. According to him, the plaintiff bank has right under the deed of hypothecation Ex. 122 to seize the hypothecated goods and to sell them even by private sale. He, therefore, contended that the bank authorities have acted in terms of deed of hypothecation and that so their above act is legal and valid. True it is that, that under the deed of hypothecation Ex. 122 the plaintiff bank has right to seize the hypothecated goods and to sell them even by private sale if the borrower commits the breach of terms and conditions of the deed of hypothecation deed. However, it is in the interest parties and in the interest of justice that when a public body like nationalised bank seizes the hypothecated goods should seize them by giving a notice to the borrower and it should sell the seized the goods after giving notice to the borrower and it should sell the seized the goods after giving notice to the borrower and by public auction. In this case after seizure of the hypothecated goods, the plaintiff's Branch Manager should have given public notice for selling the goods by public auction. He could have held a public auction within a week after seizure of the goods. Merely because there is a condition in the deed of hypothecation that the seized goods can be sold even by private sale from that itself if cannot be said that the seized goods should not be sold by public auction. Further more, there is no term or condition in the deed of hypothecation that after seizure of the goods the bank authorities should hand over possession of the rented premises to the landlord of the borrower. In view of the

above, the contention of the learned advocate for the plaintiff justifying the action of the bank authorities is without any merit and so it is rejected.

(24) The learned advocate for the plaintiff then contended that the defendant had absconded on 16/11/72 and his where-about were not known and so the bank authorities acted properly. Now both the parties have led much evidence on the above point. Now it is in evidence that on 16/11/72 and 17/11/72 the defendant was not in Bharuch. It is also in evidence that on or about 16/11/72 the defendant had vacated his residential house and he had removed his house-hold kits from his rented residential house and that the possession of his above residential house was handed over to the landlord on or about 18/11/72. Even the defendant does not dispute the above facts. Now according to the defendant and his brother Gunvantrai Maganlal Ex. 161 the defendant was present when he paid rent to the landlord under receipt Ex. 134. Now receipt Ex. 134 is dated 18/11/72. Thus according to the defendant and his brother Gunvantrai, the defendant was in Bharuch on 18/11/72. Now it is on record that the defendant had given notice to his landlord Chandulal Nanalal on 13/12/72. This notice was given through advocate Shri M.G. Shaikh. The plaintiff has produced the copy of this notice at Ex. 129. It was exhibited as the learned advocate for the defendant had no objection in its exhibition. It can be seen from this notice that the learned advocate for the defendant has stated in its argument that the defendant had gone outside for his work on 17/11/72 and he returned to Bharuch on 1/12/72 and at that time he did not find his goods etc. in the factory and that he saw board of specific ventile skebdix. Thus it is evident from the notice Ex. 129 that the defendant was not in Bharuch from 17/11/72 to 1/12/72. However, in evidence the defendant had his brother Gunvantrai tried to show that the defendant was in Bharuchon 18/11/72. In view of the above, the say of the defendant and his brother Gunvantrai that the defendant was in Bharuch on 18/11/72 does not inspire any confidence."

9. The learned trial Judge has, however, found that merely because the defendant left Bharuch on 16/11/72 it

could not be said that he absconded. He, therefore, observed that the act of the plaintiff's Branch Manager of effecting private sale was not justified although the learned trial Judge also found on appreciation of evidence that the defendant had failed to prove the value of the goods as alleged by him in the counter claim and written statement and that such goods would have fetched price of Rs. 35,000/- to Rs. 40,000/- had they been sold by public auction. Coupled with this finding of fact against the defendant, the learned trial Judge has made a reference to the rights of the plaintiff-bank flowing from the relevant clause of the hypothecation deed. The defendant executed deed of hypothecation as per Ex. 122. It is dated 10/1/1972. It is clear from Ex. 122, the deed of the hypothecation, that the defendant had opened a loan account and cash credit account as stated above against the hypothecation of all goods, articles, instruments, tools, machineries, dyes, patent, raw materials, etc. of M/s. Gujarat Foundry Works, Bharuch and they would include all furnitures, fixtures, tools, instruments, spare parts, machineries, etc. of all used for Gujarat Institute of Automobile Technology, Bharuch. Thus, the defendant had hypothecated all goods machineries, tools, etc. as also of the Gujarat Institute of Automobile Technology. Clause 11 of the hypothecation deed recites as under :-

"11. In default of payment by the Borrowers in terms of these presents or in the event of the Borrowers committing a breach of any of the terms and conditions of these presents, the Bank and their officers and Agents shall be entitled without notice to the Borrower but at the Borrowers' risk and expenses and if so required as attorneys for and in the name of the Borrowers to enter and remain at any place where the hypothecated goods shall be and to take possession of, recover and receive the same and/or appoint any officer or officers of the Bank as receiver or receivers of the hypothecated goods and/or sell by public auction or private contract or otherwise dispose of or deal with all or any part of the hypothecated goods and to enforce, realise, settle, compromise and deal with any of the rights aforesaid without being found to exercise any of these powers or being liable for any loss in the exercise therefore and without prejudice to the Bank's rights and remedies of suit against the Borrowers and to apply the net proceeds of such sale in or towards liquidation of the balance due to the Bank and

the Borrowers hereby agree to accept the Bank's account sales of realisation and to pay any short fall or deficiency therein shown."

Relying upon the aforesaid caluse of the hypothecation deed and also relying upon the plaintiff's evidence and after appreciating evidence adduced by the defendant, the learned trial Judge has concluded that the plaintiff-bank had a right to seize the hypothecated goods and to sell them by public auction or by private sale and that the defendant failed to prove that the seized goods were worth Rs. 52,000/- or that they would have fetched Rs.35,000/- to Rs.40,000/- had they been sold by public auction. The learned trial Judge also held that the sale could not be vitiated even though the seized goods were sold by private sale and not by public auction. Under such circumstances, although the learned trial Judge made observations against the action of the plaintiff-bank through its Branch Manager, the learned trial Judge decreed the plaintiff's suit.

10. Having gone through the evidence adduced before the learned trial Judge and bearing in mind the aforesaid clause of the hypothecation deed I am of the opinion that the conclusion of the learned trial Judge is quite legal, proper and justified. Simply because some observations have been made against the action of the private sale, it cannot be said that the decree passed by the learned trial Judge is not just and proper. It was for the defendant to establish that the value of the goods was worth Rs.52,000/- or that they could have fetched Rs.35,000/- to Rs.40,000/- had they been sold by public auction. Even after establishing by adducing acceptable evidence on these facts the defendant ought to have shown before the Court that the aforesaid clause of the hypothecation agreement was illegal or void in any manner. Even the learned counsel for the defendant has not been able to show before this Court that the clause is illegal or void in any manner. If the clause under which the rights of private sale is conferred upon the plaintiff-bank, it is not shown to be illegal or void in any manner, it would be apparent that the plaintiff-bank was entitled to effect private sale of the seized goods. Merely because the learned trial Judge made observations contrary to the aforesaid action of the plaintiff bank through the plaintiff's Branch Manager, it cannot be said that the action of the plaintiff-bank was bad in law.

11. In my opinion the learned trial Judge has upon appreciation of the evidence adduced before him, rightly answered the issues in favour of the plaintiff-bank and

has rightly decreed the plaintiff's suit. In the facts and circumstances of the case, there is no warrant for giving effect to the observations made by the learned trial Judge against the plaintiff-bank.

12. The learned counsel for the defendant has then raised the question of grant of running interest at the rate of 10.5% p.a. by submitting that the commercial rate of interest could not have been awarded as the amendment in sec. 34 of the C.P.C. was made on or around 1/7/1977, whereas the suit was filed on or around 6/3/1973. It is not in dispute that the interest which has been awarded by the learned trial Judge is at the contractual rate. There is no dispute raised against the award of interest at the trial of the suit. Besides, when the suit was decreed the amendment had already come into force. Hence, bearing in mind the facts and circumstances of the case, the submission of Mr. Vin, learned counsel for the defendant against the order of interest cannot be accepted.

13. No other point has been canvassed in this First Appeal against the judgment and decree of the learned trial Judge. Hence, this appeal filed by the defendant deserves to be dismissed. However, in the facts and circumstances of the case I do not propose to order any cost in so far as this appeal is concerned. Following order is, therefore, passed :-

The defendant's appeal is hereby dismissed with no order as to cost.

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